Court of Appeals No. 44818-1

Appeal of Clark County Superior Court Cause No. 12-2-03672-5

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

RICHARD COLF, Appellant, v. CLARK COUNTY, WASHINGTON, a municipality Respondent.
CLARK COUNTY BRIEF

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I. INTRODUCTION

This case is an appeal, under the Land Use Petition Act (LUPA), RCW 36.70C, from a decision of the Clark County Superior Court upholding the Hearings Examiner's Final Order prohibiting a temporary dwelling (mobile home) under the Clark County Code.

II. APPELLANT'S CLAIM ON APPEAL

The gravamen of appellant's claim on appeal is that he does not have a temporary dwelling on the property. In the alternative, he argues that the mobile home on the property was "grandfathered in" under the County Code.[1]

III. SUMMARY OF ARGUMENT

The appellant's contentions were properly rejected by the Superior Court and by the Hearings Examiner in the proceedings below. (Appendix C and D) The thoughtful analysis at both levels explained why the temporary dwelling on the property was not a lawful, nonconforming use nor was it "grandfathered in." Notwithstanding this result, the Hearings Examiner's decision allowed the appellant an additional option as an

[1] He also asserted the County was estopped from applying the Code because of the passage of time but appears now to have dropped that issue in this appeal.

alternative to removing the unlawful mobile home. The appellant may pursue a boundary line adjustment at any point in time.

IV. STATEMENT OF THE CASE

A. Facts

The parties are not in dispute regarding the facts in this case. On April 5, 1993, Rachel Lingafelt, the property owner prior to the appellant, applied for a "Temporary Hardship Mobile Home Permit (C93T0166)" to assist her father. (CP 6, Appendix A) On May 5, 1993, she acquired the preliminary documentation from the County for the temporary placement of a mobile home on the property. (CP 6, Appendix A)

The County's initial review provided it was for "2 YR TEMP FOR FATHER." (CP 6, Appendix A) The purpose was to allow Ms. Lingafelt to work out the hardship with her family, allowing her father to reside on the property. (CP 6, Appendix A) The proposed temporary permit provided further as follows: "To Expire: 05/05/94." (CP 6, Appendix A)

Ms. Lingafelt subsequently failed to have the mobile home inspected as required and the permit application process was never completed. (CP 6, Appendix C) The temporary approval lapsed. (CP 6, Appendix C) Based on these facts, the mobile home was not lawfully sited on the property in accordance with the ordinance governing temporary family hardship. (CP 11 – 12, Appendix B)

On October 3, 2011, a complaint was received from the County's Permit Center via the County Assessor's Office. (CP 6, Appendix C) A review of the County's records verified the lack of a permit for a mobile home on the property. (CP 6, Appendix C) A site visit on October 6, 2011 confirmed there were two mobile homes on the property in violation of the County Code that only allows one. (CP 6, Appendix C)

On October 10, 2011, the County advised the appellant of the violation and the lack of an occupancy permit. (CP 6 – 7, Appendix C) This was followed by two additional letters from the County, one on November 16, 2011 and another on January 18, 2012. (CP 6 – 7, Appendix C)

After three letters and further contact with the property owner failed to produce compliance, the County issued a Notice and Order under the County Code as follows:

> 1. Failure to obtain temporary occupancy approval for hardship mobile home. This is a violation Clark County Code 40.260.210(c)(3). Hardship mobile home permit C93T0166 expired on May 5, 1994 without inspection and temporary occupancy approval.

Notice and Order, June 4, 2012, p. 1. (CP 4 – 6, Appendix C)

On June 11, 2012, the appellant submitted an appeal. (CP 4, Appendix C) He made two contentions in it: first, that there are no

"temporary dwellings" on the property; and second, that in any event, the mobile home was "grandfathered in."

B. The Hearings Examiner's Decision

On July 26, 2012, the Hearings Examiner considered the appellant's appeal from the County's decision. (CP, 3) Thereafter, on September 12, 2012, he issued a Final Order upholding the County. (CP, 12) (Appendix C) He determined in pertinent part as follows:

(1) the property owner had the burden of proof to establish that the mobile home was allowed as a legal nonconforming use; (CP 11)

(2) the evidence demonstrated that the mobile home violated the County Code; (CP 11)

(3) the mobile home was not inspected [the application process was not completed]; the temporary approval lapsed; the mobile home "became an illegal use when it was not removed from the property"; (CP 11)

(4) the County Code only allowed mobile homes as nonconforming uses if they were legal, not those without a valid permit; and, (CP 11)

(5) the property owner's appeal is denied and he is ordered to remove the mobile home within sixty (60) calendar days from the date of the Final Order or, apply for a boundary line adjustment to place the mobile home on a separate parcel and, if the boundary line adjustment is approved, obtain all required inspections and approvals for the mobile home. (CP 11)

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C. The Superior Court Decision

The appellant submitted an appeal to the Superior Court pursuant to the Land Use Petition Act, RCW 36.70C. The Court considered the briefs and arguments of the parties, thereafter upholding the Hearings Examiner's decision on March 25, 2013, with entry of the Order and Judgment on April 19, 2013. (CP 217 – 226, Appendix D) Thereafter, the appellant filed an appeal with this Court. (CP 235)

V. LEGAL ANALYSIS AND ARGUMENT

A. Standard Of Review

The standard of review is set forth in the Land Use Petition Act (LUPA), RCW 36.70A *et seq.*, where the Court is acting in its appellate capacity. The appellant has the burden of establishing error. *Families of Manito v. City of Spokane*, 172 Wn. App. 727, 735, __ P.3d __ (2013) LUPA provides as follows:

> **RCW 36.70C.130 Standards for granting relief** [2]
>
> (1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

[2] The section is set forth in full except for the portion related to renewable resource projects added by the Legislature in 2009 and not applicable to this case.

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130

In this case, the primary standards that apply are (b) and (d) relating to the application and interpretation of the law. The appellant also refers to (c) concerning substantial evidence in the record supporting the decision although he does not challenge any specific findings of the Hearings Examiner.

In order to challenge a factual finding, the appellant must demonstrate the finding in question "is not supported by evidence that is substantial when viewed in light of the whole record." RCW 36.70C.130(1)(c) "Substantial evidence" is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the

order." *Redmond v. Growth Hearings Board*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998) (citing, *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 929 P.2d 510 (1997)) Under this standard, an appellate court is not allowed to substitute its judgment for that of the fact-finder. Instead, the Court's review "necessarily entails acceptance of the fact-finder's views regarding the credibility of witnesses and the weight to be given to reasonable but competing inferences." *Hilltop Terrace Owner's Assoc. v. Island County*, 126 Wn.2d, 22, 30, 891 P.2d 29 (1995) In addition, the Court views the facts and inferences from them in a light most favorable to the County "as the prevailing party in the hearing examiner's decision." *Families of Manitou v. Spokane*, *supra,* at 739-740.

In order to overturn the Hearings Examiner's legal conclusions, the appellant must demonstrate that the decision is "an erroneous interpretation of the law, after allowing for such deference as is due the construction of the law by a local jurisdiction with expertise." RCW 36.70C.130(1)(b) Issues raised under this subsection are questions of law with *de novo* review. *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999)

In the alternative, in order to challenge the Hearings Examiner's application of the law, the appellant has the burden to establish "the land

use decision is a clearly erroneous application of the law to the facts." RCW 36.70C. 130(1)(d) For this standard, the Court of Appeals has held:

> The clearly erroneous test for (d) is whether the court is "left with the definite and firm conviction that a mistake has been committed." *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997). Our review is deferential. We view the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority. *Davidson v. Kitsap County,* 86 Wn. App. 673, 680, 937 P.2d 1309 (1997)

Schofield, supra, at 586-587

In addition, if a statute or provision is not ambiguous, the plain meaning of the words controls. *McTavish v. City of Bellevue*, 89 Wn. App. 561, 565, 949 P.2d 837 (1998) Where a statute or provision is ambiguous, the agency's interpretation is accorded the greatest deference in determining legislative intent and in resolving the matter. *Waste Management of Seattle v. Utilities and Transportation Commission*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994)

Issues regarding the application of the law to the facts under LUPA are governed by RCW 36.70C.130(1)(d). In order to obtain relief, the appellant must demonstrate that the "land use decision is a clearly erroneous application of the law to the facts." The Court may only grant relief under this standard when it is left with a firm and definite conviction

that a mistake has been committed. *Wenatchee Sportsman Assoc. v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)

B. The Decision Is Amply Supported By The Record

1. The Decision Is Supported By Substantial Evidence

The facts regarding the temporary placement of the mobile home are not disputed and were not challenged below. The property owner prior to the appellant applied for a "Temporary Mobile Home Hardship Permit" to accommodate her father in 1993. (CP 6, Appendix A) The permit application, based on hardship, specifically stated "2 YR TEMP FOR FATHER." (CP 6, Appendix A) The permit also provided an end date as follows: "To Expire: 05/05/94." (CP 6, Appendix A) This "hardship" feature of the County Code offered a convenient means for addressing the special needs of a family on a temporary basis.

The property owner failed to have the mobile home inspected, the permit approval process was not completed and in any event, the proposed temporary permit lapsed. (CP 4-6, Appendix C) The mobile home thus did not comply with the County Code in effect at the time.

The ordinances in the County Code, Chap. 18.413, **Temporary Dwelling Permits**, a complete copy of which is attached (Appendix B),

provided the requirements for the placement of a mobile home based on hardship as follows:

18.413.010 Temporary dwellings authorized – hardship.

Subject to the conditions and upon issuance of the permit provided for herein, one (1) or more temporary dwellings may be established and maintained on a lot, tract or parcel if the parcel is already occupied by a principal dwelling for use only by one (1) of the following:

A. A person who is to receive from or administer to a resident of the principal dwelling, continuous care and assistance necessitated by advanced age or infirmity, the need for which is documented by a medical physician's statement;

* * *

C. Relatives over sixty two (62) years of age on a fixed or limited income, who are related by blood or marriage to a resident of the principal or temporary dwelling.

18.413.020 Temporary dwellings – conditions.

Temporary dwellings authorized herein shall be subject to the following minimum conditions:

* * *

B. The temporary dwelling shall be a temporary structure such as a mobile home designed, constructed, and maintained in a manner which will facilitate its removal at such time as the justifying hardship or need no longer exists.

* * *

E. Upon cessation of the hardship or need justifying the temporary dwelling permit, either such dwelling shall be removed or the owner of the lot , tract or parcel shall comply with all applicable zoning requirements.

18.413.30 Temporary dwellings - permits.

A. Applications for temporary dwelling permits shall be submitted to the Public Works Department on forms provided by the County, and shall be accompanied by a processing fee established for mobile siting permit, and shall include:

* * *

4. Statement signed by the applicant describing the hardship or need; provided that if the applicant is relying upon Section 18.413.010(A), a letter from a medical doctor verifying the need for continuous care and assistance shall also be submitted; and

5. A declaration to be filed with the County Auditor upon approval of the application setting forth the temporary nature of the dwelling.

* * *

C. A temporary dwelling permit shall be valid for two (2) years, and may be renewed by the issuing body for successive two (2) year periods upon written substantiation by the applicant to the continuing hardship or need justification. Upon the expiration of the two (2) year period, or at the end of each successive two (2) year period(s), if granted, the applicant shall notify the Planning Director in writing that the temporary dwelling has been removed, and further, said notice shall include a request for inspection to determine that the temporary dwelling has in fact been removed in compliance with the permit.

Temporary Dwelling Permits, Chapter 18.413 (Appendix B)

The County Assessor's office, in the course of its work, informed the County's Permit Center of the mobile home last year. (CP 6, Appendix C) The Enforcement Coordinator confirmed its presence and after several efforts to achieve compliance, issued a Notice and Order on June 4, 2012. (CP 4 – 7, Appendix C) The prior proposed permit, even assuming for the sake of argument that the application process was complete, expired May 5, 1994 and the appellant (the current property owner) failed to obtain a permit for temporary occupancy. (CP 6, Appendix C)

All these facts are amply supported by substantial evidence. Moreover, the appellant had the burden of proof "to demonstrate the legal nonconformity" of the use under Section 40.530.010C(2) of the County Code. He did not submit any evidence establishing that the temporary placement of the mobile home was lawful. (CP 11 -12, Appendix C)

2. The County Correctly Applied Its Own Ordinances

The ordinance for Temporary Dwelling Permits, Chapter 18.413, was in effect in 1993 when the mobile home was placed on the property due to a temporary hardship. The County subsequently replaced the ordinance in 2003. A new ordinance was adopted to address mobile homes and nonconforming uses.

The new ordinance, entitled "Mobile Home Permits," provides in Section 14.32A.130(3) that nonconforming uses are allowed. However, the County made this general provision even more *specific* by including the requirement that it only applies to *legal* nonconforming uses. Section 14.32A.140(4) This ensures that in order to qualify as lawful, a nonconforming use prior to the enactment of the ordinance in 2003 had to comply with the standards for placement in effect at that time.

The County thus correctly applied these ordinances, at the time the matter arose in 2012, when it determined that the mobile home was not a *legal* nonconforming use. In addition, since the mobile home was only placed on the property due to a *temporary* family hardship, it was required to comply with Section 40.260.210(C)(3).

The ordinances are clear and not subject to interpretation to reach a different conclusion. *Lakeside Industries v. Thurston County*, 119 Wn. App. 886, 901, 83 P. 3d 433 (2004) ("...when a statute is clear and unambiguous, we lack authority to construe it to reach a result not plainly stated."); *Stone v. Sewer District*, 116 Wn. App. 434, 438, 65 P. 3d 1230 (2003) The provisions apply so that their plain meaning and context are considered. *Fire District v. Whatcom County*, 151 Wn. App. 601, 610, 215 P. 3d 956 (2009); *Faben Point Neighbors v. City of Mercer Island*, 102

Wn. App. 775, 778, 11 P. 3d 322 (2000) The requirements in the ordinances are "read together as a unified whole" to achieve a harmonious scheme. *Johnson v. King County*, 148 Wn. App. 220, 226, 198 P. 3d 546 (2009); *USW v. Utilities and Transportation Comm'n*, 134 Wn. 2d 74, 118, 949 P.2d 1337 (1997). Based on these established principles, the result is a correct decision that is neither "an erroneous interpretation of the law" or a "clearly erroneous application of the law to the facts."

In addition, Washington Courts have long followed the rule that the appellant has the burden of meeting the requirements for proving a valid nonconforming use. They are: (1) the use existed before the County enacted the zoning ordinance; (2) the use was *lawful* at the time; and (3) the applicant did not abandon or discontinue the use for over a year. *First Pioneer Trading Co. v. Pierce County*, 146 Wn. App. 606, 191 P.3d 928 (2008) (emphasis supplied) The appellant in this case failed to meet this burden. *See also, Jefferson County v. Lakeside Industries*, 106 Wn. App. 380, 385, 23 P.3d 542 (2001); *North/South Airpark v. Haagen*, 87 Wn. App 765, 772, 942 P. 2d 1068 (1997)

The Supreme Court recently reiterated these requirements in *King County, Department of Development v. King County*, ___ Wn.2d ___, ___ P.2d ___ (Slip Opinion, June 27, 2013) (En Banc) as follows:

> A component of establishing a preexisting use is that the use be lawfully established. This rule has been consistently recognized by our cases. *Rhod-A-Zalea*, 136 Wn.2d at 6 (stating rule that use must have "lawfully existed" prior to becoming a nonconforming use); *McMilian*, 161 Wn. App. at 590-91 (holding that petitioner's status as a trespasser precluded a finding that the use lawfully existed, and therefore the use could not be a nonconforming use); *First Pioneer Trading Co. v. Pierce County,* 146 Wn. App. 606, 614, 191 P.3d 928 (2008) (discussing petitioner's failure to obtain proper permitting and finding that petitioner had not established a nonconforming use).

King County, *supra*, at 13.

In this case, the prior owner applied for a *temporary* hardship permit. (CP 6, Appendix C) Yet she failed to have the mobile home inspected as required and the permit application process was not complete. (CP 6, Appendix C) The temporary approval lapsed. (CP 6, Appendix C) The mobile home was thus not lawfully sited in accordance with the ordinance governing temporary family hardship. In any event, the temporary approval expired May 5, 1994. (CP 6, Appendix A)

3. The County's Interpretation Of Its Own Ordinances Is Entitled To Deference

The County's interpretation of its own ordinances is based on its expertise. For this reason, it is entitled to deference. This principle is

included in the error of law standard of review in LUPA where the Legislature explicitly provided as follows:

> The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

RCW 36.70C.130(b)

The statutory provision expresses a well-established principle in land use law. *Schofield v. Spokane County*, *supra,* at 586-587 ("Deference is given to the Board's expertise.") *Id.* at 588 Deference is founded on the doctrine of separation of powers and the respect the judicial branch of government accords the executive branch in its decision-making and the legislative branch in its law-making.

The Legislature's specific inclusion of this principle in the standard of review in LUPA recognizes that land use planning is a specialized area of expertise. Notably, this is borne out in the case before the Court. In addition to the professional background and credentials of the Hearings Examiner in land use law, and as a completely independent and impartial decision-maker, the County Enforcement Coordinator's expertise is reinforced by his education, training and experience with many years in the field.

The Courts in Washington have consistently reiterated the principle of deference in highly technical fields like land use and environmental regulation. *Citizens v. Mercer Island*, 106 Wn. App. 461, 475, 24 P.3d 1079 (2001) (local government's interpretation of its own ordinance is entitled to deference in LUPA appeal); *Redmond v. Growth Hearings Board*, 136 Wn. 2d 38, 46, 959 P. 2d 1091 (1998) As the Court in *Schofield v. Spokane, supra*, stated in applying LUPA: "...deference should be given to an agency's interpretation of the law where the agency has special expertise in dealing with such issues." *Id.* at 587-588.

The Court of Appeals reaffirmed this principle in a LUPA case recently in *Families of Manito v. City of Spokane*, 172 Wn. App. 727, __ P.3d __ (2013), stating that a "'reviewing court gives considerable deference to the construction of the challenged ordinance by those officials charged with its enforcement'" (citations omitted) while explaining that the "primary foundation and rationale for this rule is that considerable judicial deference should be accorded to the special expertise of administrative agencies." *Families of Manito* at 740.

The Court of Appeals then revisited this again only two weeks later in another LUPA case that month in *Chinn v. City of Spokane*, 173 Wn. App. 89, __ P. 3d __ (2013), holding that it accords deference to local

government's expertise, while reviewing *de novo* claims of error in interpreting the ordinance in issue. *Chinn, supra* at 95. At the same time, the Court reiterated the rule that it is "deferential to the fact findings of the highest forum below that exercised its fact finding authority, here, the City Hearing Examiner." *Id.*

In both *Families of Manito* and *Chinn, supra*, two of the most recent cases arising under LUPA in Washington, the Court of Appeals followed the same standard that has governed judicial review since the statute was adopted in 1995. While the Court clearly determines what the law is in its review here, the expertise of the officials who implement land use in local government is accorded deference.

The cases concerning state agencies under the Administrative Procedures Act (APA), RCW 34.05 et seq., are in accord. *Pacific Topsoils v. Department of Ecology*, 157 Wn. App. 629, 641, 238 P.3d 1201 (2010) (agency's interpretation of statutes and regulations entitled to great weight in APA appeal); *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004) (agency's expertise in review of factual findings is entitled to due deference in APA appeal); *Lund v. Department of Ecology*, 93 Wn. App. 329, 333, 969 P.2d 1072 (1998) (agency's interpretation of law within its realm of expertise is entitled to

substantial weight in APA appeal); *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993) (agency's specialized knowledge and expertise is entitled to due deference in APA appeal). This is also true for federal agencies as the U. S. Supreme Court held in *American Electric Power v. Connecticut*, 564 U.S. __ (2011) upholding the authority of the Environmental Protection Agency (EPA) based on its expertise.

C. The Appellant's Arguments Are Without Merit And Do Not Meet The Burden Of Proof Necessary To Overturn The Superior Court's Decision

1. The Temporary Dwelling On The Property Was Not A Legal Use

The appellant contends that there are no temporary dwellings on the property. He points to improvements made to the mobile home after he purchased it from the prior owner. However, this ignores the legal requirements set forth above regarding (1) "Temporary Dwelling Permits" in the County Code, Chapter 18.413, that were in effect at the time of the mobile home's placement and, (2) the subsequent ordinances governing mobile home permits and nonconforming uses.

The burden was on the appellant to establish that the nonconforming use was lawful pursuant to the 2003 ordinance, County Code Section 40.530.010C(2), but he did not do that. On the contrary, it is undisputed that the permit requirements were never *completed* and even

assuming they were for the sake of argument, the permit expired at the end of the two-year period in 1994. The mere passage of time since the placement of the mobile home did not transform it into a lawful use.

2. The Temporary Dwelling On The Property Was Not Grandfathered In

The appellant also asserts that in adopting the 2003 ordinance, the County allowed prior uses to continue in Section 14.32A.130(3) of the Code. As set forth above, the 'new' ordinance only recognized prior *lawful* uses in County Code Section 14.32A.140(4). The provision states as follows:

> The following are exempt from requirements of this chapter:
>
> (4) Manufactured homes *legally* installed, placed, or existing prior to the effective date of this chapter as described in Section 14.32A.130(3) and above.

County Code 14.32A.140(4) (emphasis supplied)

Since the temporary mobile home in this matter was not lawful in 2003, it does not fall within the purview of the ordinance.

The appellant's claim, that the mobile home was installed or placed prior to 2003, misses the point. The provision in the Code only preserves legal nonconforming uses. The use was never lawfully established. *King County Department of Development v. King County, supra,* at 13. In addition, even if, for the sake of argument, it was assumed valid, the

appellant cannot surmount a second hurdle: the placement expired in two years because it was in fact a *temporary* use. The appellant's jesuitical contstruction of the provision conflicts with the law and the facts.[3] [4]

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[3] The Hearings Examiner correctly rejected the appellant's position as follows:

> The appellant's interpretation, that CCC 14.32A.130(3) made all existing manufactured homes in the County that did not conform to the requirements of the new ordinance are nonconforming, regardless of whether they were legally established prior to the effective date of the ordinance, would render CCC 14.32A.140(4) meaningless. If all existing manufactured homes in the County that did not conform to the requirements of were made nonconforming pursuant to CCC 14.32A.130(3), the exemption for legally established manufactured homes CCC 14.32A.140(4) would be redundant and unnecessary. The examiner must interpret the Code to give effect to all the language used, with no portion rendered meaningless or superfluous.

Final Order, (CP 12)

[4] The appellant also argued in Superior Court that the County is equitably estopped from enforcing the law. The issue of equitable estoppel is not specifically re-argued by the appellant here. However, it is instructive to include why the doctrine does not apply. Where a representation relied on is one of law and not fact or, if both parties had an equal opportunity to determine the truth of the facts represented, Washington courts have rejected the doctrine. *Gerean v. Martin-Joven*, 108 Wn. App. 963, 974, 33 P.3d 427 (2001) This was addressed in *Chemical Bank v. WPPSS*, 102 Wn. 2d 874, 905, 691 P.2d 524 (1984), where the Supreme Court held:

> ...the doctrine of equitable estoppel will not be applied where both parties have the same opportunity to determine the truth of those facts. Consequently, we have observed:
>
> In order to create an estoppel it is necessary that:
>
> "The party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the state of facts, but was also destitute of any convenient and available means of acquiring such knowledge; and that where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel."

Footnotes continued on the next page.

VII. CONCLUSION

The facts were not disputed in this case and the decision is supported by more than substantial evidence in the record. Based on these facts, the appellant does not have a legal nonconforming use and the law was correctly applied. Moreover, the County's ordinances are clear and their interpretation is entitled to deference.

The burden of proof was on the appellant and he did not sustain it. The County's decision was correct and this, in turn, protects the residents

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Chemical Bank, 905 (original emphasis) (citing *Leonard v. Washington Employers, Inc.*, 77 Wn.2d 271, 280, 461 P.2d 538 (1969), quoting, *Wechner v. Dorchester*, 83 Wash. 118, 145 P. 197 (1915))

The appellant could easily have made the appropriate inquiries regarding the status of the mobile home when he purchased the property. This due diligence is a basic step in any property transaction and certainly where, as here, the appellant presented extensive evidence revealing wide experience in such matters. Nevertheless, the appellant did not contact the appropriate government departments. He also did not review the County Code or seek counsel regarding the sections of the Code relating to the issues he raises now.

Under these circumstances, the appellant clearly had the "same opportunity to determine the truth" regarding the status of the property he purchased. The effort to blame the County for his omissions is unavailing. Accordingly, equitable estoppel does not apply to this case.

of the area, preserves property rights and enhances aesthetic and economic values for the benefit of the whole community.

DATED this 12 day of August, 2013.

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APPENDIX

EXHIBIT A

COUNTY OF CLARK

Code Administration Division

1408 Franklin 206/699-2375

05/05/93 14:19

Activity No : C93T0166
Status : APPROVED

File No : 00061410
Validated by : NL
Inspector area:
Applied : 04/05/93
Approved : 05/05/93
Completed :
To Expire : 05/05/94

This type : MOBILE HOME PLACEMENT
Title : TAX LT # 15 NE 8-5-2
Parcel number : 261067 0000
Group-occup/use:

Owner : LINGAFELT RACHEL
Applicant : LINGAFELT RACHEL
Applicant Addr : 9017 NE SPURREL RD WOODLAND WA 98674
Phone number : 225-7625
Job Address : 9017 NE SPURREL RD
First legal : #15 SEC 8 T5NR2EWM 4.31A
Plat number : 075560 SECTION 8 T5N R2EWM
Census tract : 40200 School district: 103
Class code : O/S
Valuation : 0
Construction : OTH
Description : 26' X 44' MOH 2 YR TEMP FOR FATHER

25 S FEE 4.50
19 PLUMB 10.00

TOTAL 44.50
CHECK 44.50

Additional Information: RF ZONE CHECK ENVIRO
NEED SEPTIC PERMIT NEED
WAVE LETTER 2 YEAR TEMP
MOH FOR FATHER(OVER 52)
RAINDRAIN TO SPLASHBLOCK

Fee description	Units	Fee/Unit	Ext fee	Data
Application Fee			10.00	
Permit Fee			30.00	
State Building Code Fee			4.50	
Each Septic Connection	1	3.00	3.00	
Each Water Service to 1"	1	7.00	7.00	
Mobile Home & Connection Fee Totals				

*** Fees Required ***

Fees:	64.50
Adjustments:	.00
Total Fees:	64.50

*** Fees Collected & Credits ***

Receipt No.	Date	Payment
	05/05/93	44.50
Total Credits:		.00
Total Payments:		64.50
Balance Due:		.00

NOTICE

This permit becomes null and void if work or construction is not commenced within 180 days, or if construction or work is suspended or abandoned for a period of 180 days at any time after work is commenced. I hereby certify that I have read and examined this application and know the same to be true and correct. All provisions of laws and ordinances governing this type of work will be complied with whether specified herein or not. The granting of a permit does not presume to give authority to violate or cancel the provisions of any other state or local law regulating construction or the performance of construction.

Signature of Contractor or Authorized Agent Date
Rachel Lingafelt 5-4-93

Signature of Owner Date

EFFECTIVE DATE OF PERMIT IS VALIDATED

Exhibit 12

EXHIBIT B

Chapter 18.413

TEMPORARY DWELLING PERMITS

Sections:

18.413.010 Temporary dwellings authorized — hardship.

Subject to the conditions and upon issuance of the permit provided for herein, one (1) or more temporary dwellings may be established and maintained on a lot, tract, or parcel if the parcel is already occupied by a principal dwelling for use only by one (1) of the following:

A. A person who is to receive from or administer to a resident of the principal dwelling, continuous care and assistance necessitated by advanced age or infirmity, the need for which is documented by a medical physician's statement; or

B. A caretaker, hired hand, or other similar full-time employee, working on the lot, tract, or parcel in connection with an agricultural or related use of the premises; or

C. Relatives over sixty-two (62) years of age on a fixed or limited income, who are related by blood or marriage to a resident of the principal or temporary dwelling.

(Ord. 1979-04-46; Sec. 18.511, Ord. 1980-06-80; Sec 1, Ord. 1991-06-04; Sec. 17, Ord. 1992-06-04)

18.413.020 Temporary dwellings — conditions.

Temporary dwellings authorized herein shall be subject to the following minimum conditions:

A. The lot, tract or parcel shall be of such size and configuration, and the temporary dwelling shall be located thereon in such a manner as to enable compliance with such zoning and subdivision regulations as would be applicable but for the authorization of this chapter; provided that a temporary dwelling may be approved for a one (1)-acre site within the Agricultural, Forest, Rural Farm, Rural Estate or Rural Residential Districts if the tract or parcel of which it is a part is one (1) acre or larger in size and is otherwise in compliance with the provisions of this Title.

B. The temporary dwelling shall be a temporary structure such as a mobile home designed, constructed, and maintained in a manner which will facilitate its removal at such time as the justifying hardship or need no longer exists.

C. A current vehicular license plate, if applicable, shall be maintained on the temporary dwelling.

D. No more than one (1) temporary dwelling shall be authorized under this chapter if the primary dwelling is a mobile home.

E. Upon cessation of the hardship or need justifying the temporary dwelling permit, either such dwelling shall be removed or the owner of the lot, tract, or parcel shall comply with all applicable zoning subdivision requirements.

(Sec. 18.511, Ord. 1980-06-80; Sec. 5, Ord. 1981-01-07; Ord. 1979-04-46; Sec. 6, Ord. 1984-07-47)

18.413.030 Temporary dwellings — permits.

A. Applications for temporary dwelling permits shall be submitted to the Public Works Department on forms provided by the county, and shall be accompanied by a processing fee established for mobile siting permit, and shall include:

1. A site plan showing the size and boundaries of lot, tract, or parcel; the location of all existing buildings; and the proposed location of the temporary dwelling;

2. A description of the proposed temporary dwelling;

3. Documentation of approval of water supply and sewage disposal system by the appropriate governmental agency;

4. Statement signed by the applicant describing the hardship or need; provided that if the applicant is relying upon Section *18.413.010(A)*, a letter from a medical doctor verifying the need for continuous care and assistance shall also be submitted; and

5. A declaration to be filed with the County Auditor upon approval of the application setting forth the temporary nature of the dwelling.

B. Applications for a single temporary dwelling

Exhibit 20a

may be issued by the Director of Public Works. Any person aggrieved by the grant or denial of such permit may appeal the Director's decision to the Board of Adjustment. The Board of Adjustment shall also hear, upon such notice as is provided for conditional use permit, applications seeking approval for two (2) or more temporary dwellings on the same lot, tract, or parcel.

C. A temporary dwelling permit shall be valid for two (2) years, and may be renewed by the issuing body for successive two (2)-year periods upon written substantiation by the applicant to the continuing hardship or need justification. Upon the expiration of the two (2)-year period, or at the end of each successive two (2)-year period(s), if granted, the applicant shall notify the Planning Director in writing that the temporary dwelling has been removed, and further, said notice shall include a request for inspection to determine that the temporary dwelling has in fact been removed in compliance with the permit. *(Ord. 1979-04-46; Sec. 18.511, Ord. 1980-06-80; Sec. 7, Ord. 1984-07-47)*

18.413.040 **Revocation.**

In addition to any other remedies provided for by law, violation of permit conditions, standards of chapter, or other applicable land use requirements, including the provisions of Chapter *9.24* of the Clark County Code, shall constitute grounds for revocation of a temporary dwelling permit. Such revocation may be ordered following a public hearing by the Clark County Land Use Hearing Examiner, whose decision shall be final and not appealable to the Board. *(Sec. 2, Ord. 1991-06-04)*

Exhibit 206

EXHIBIT C

COPY
ORIGINAL FILED
APR 18 2013
Scott G. Weber, Clerk, Clark Co

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

RICHARD COLF, Petitioner, v. CLARK COUNTY, WASHINGTON, Respondent.	No. 12-2-03672-5 ORDER AND JUDGMENT AFFIRMING CLARK COUNTY AND DISMISSING APPEAL

This matter came before the Honorable David Gregerson on March 15, 2013 on appeal from a Final Order of a land use decision of the Clark County Hearings Examiner dated September 12, 2012 affirming the County's enforcement action on Plaintiff Richard Colf's property; the Plaintiff was represented by Ben Shafton; the County was represented by Lawrence Watters, Deputy Prosecuting Attorney; the Court considered the briefs and arguments of the parties and the files and records in this matter; now, therefore

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the appeal was heard under the Land Use Petition Act (LUPA), RCW 36.70C, *et seq.*, based on the administrative record below and the Final Order of the Hearings Examiner dated September 12, 2012 is affirmed; and

CLARK COUNTY PROSECUTING ATTORNEY
CIVIL DIVISION
604 W EVERGREEN BLVD • PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2478 (OFFICE) / (360) 397-2184 (FAX)

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff did not sustain the burden of proof required under LUPA including: RCW 36.70C.120 (1) (b) (concerning an erroneous interpretation of the law); RCW 36.70C.120 (1) (c) (concerning substantial evidence supporting the Final Order); and RCW 36.70C.120(1) (d) (concerning a clearly erroneous application of the law to the facts); and

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff did not sustain the burden of proof necessary to establish the claim of equitable estoppel against the County; and

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Memorandum Decision of the Court dated March 20, 2013 is adopted, incorporated by this reference and attached, denying the petition and affirming the Final Order of the Hearings Examiner dated September 12, 2012.

DATED this 19 day of April, 2013.

/s/ David E. Gregerson

Judge David E. Gregerson
Clark County Superior Court

Presented by:

Lawrence Watters, WSBA #7454
Deputy Prosecuting Attorney
Of Attorneys for Respondent Clark County

Approved as to form, notice of presentation waived:

Ben Shafton
Attorney for Plaintiff

CLARK COUNTY PROSECUTING ATTORNEY
CIVIL DIVISION
804 W EVERGREEN BLVD • PO BOX 5000
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

RICHARD COLF, Plaintiff, v. CLARK COUNTY, WASHINGTON, Political subdivision of the State of Washington, Respondent.	Case No. 12-2-03672-5 MEMORANDUM DECISION

INTRODUCTION

This matter came on for hearing before the court on March 15, 2013, on appeal from a land use hearing and decision. Petitioner Richard Colf (hereinafter "Colf") appeals the Final Order of hearings examiner for Clark County, Washington, dated September 12, 2012 affirming Clark County's enforcement action against the second mobile home on petitioner's property. This appeal is pursuant to RCW 36.70C.130, which reads as follows:

> (1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this

subsection has been met. The standards are:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

(Italicized portions indicating the specific grounds argued by petitioner).

SUMMARY OF FACTS

The factual record is largely in agreement between the parties.

Colf purchased a parcel of land in Woodland in July of 1998 from Rachel Butler f/k/a Rachel Cairns f/k/a Rachel Lingafelt. At the time of his purchase, there were two mobile homes placed on the property—the second having been placed on the property in 1993 pursuant to a county permit which allows for placement of a second mobile home under certain circumstances of personal hardship. 40.260.210 and CCC 18.413 (repealed). Said permit identified a 26' x 44' mobile home, and a 2 year temporary permit for father (over 62). No other permit, or extension of the prior permit, was applied for obtained.

On October 3, 2011, Clark County received a complaint about the second mobile home on the Colf property. Said complaint eventually led to investigation and action by Clark County's code enforcement department, which resulted in the hearing and this petition for review.

Clark County takes the position that the second mobile home violates Clark County Code 40.530.010 (one home per lot) because the original permit which allowed its installation and use expired in either 1994 or 1995. Petitioner argues for a different and more permissive interpretation of the CCC or, alternatively, that the mobile home is effectively otherwise "grandfathered."

LEGAL ISSUES

1. Does CCC 14.32A allow Colf to keep the second manufactured home on the premises?
2. Is the second manufactured home a "temporary dwelling" for the purposes of CCC 4.260.210?
3. Is Clark County equitably estopped from taking enforcement action against Colf?

LEGAL ANALYSIS

In order to overturn the hearings examiner's decision on judicial review on the basis of LUPA subsection (1)(b), petitioner must demonstrate that the hearings examiner's decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of the law by a local jurisdiction with expertise.

Such issues are purely legal and are reviewed *de novo.* Schofield v. Spokane County, 96 Wn.App. 581, 980 P.2d 277 (1999).

If challenging the application of the law to the factual record under LUPA subsection (1)(d), petitioner must establish that the land use decision is a clearly erroneous application of the law to the facts. The court of appeals has held that under this standard, the petitioner must establish that the court is left with the definite and firm conviction that a mistake has been committed. Wenatchee Sportsman Assoc. v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Court review is deferential, with reasonable inferences to be given in favorable light to the party which prevailed at the fact-finding level. Schofield, supra at 586-587.

1. *Does CCC 14.32A allow Colf to keep the second manufactured home on the premises?*

The hearings examiner cited the specific provisions of CCC 40.260.210, former CCC 18.413, CCC 14.32A.130(3), CCC 14.32A.140, and CCC Title 32. The hearings examiner interpreted all of these together to reach the following conclusions:

> a. Colf's second manufactured home was placed on the Property as a temporary dwelling under a placement permit pursuant to former CCC 18.413.
> b. Said permit was only valid for two years unless renewed. It was never renewed.
> c. The manufactured home was never removed from the property as required by former CCC 18.413.030.C and current CCC 40.260.210.C(3). Therefore, it is a violation of CCC 40.250.210.C(3)

(Hearings Examiner Final Order P. 8, §4 and p. 9, §6)

Petitioner challenges the hearings examiner's interpretation by arguing that the second manufactured home is exempt from CCC 14.32A by virtue of a

"grandfathering", to wit: by operation of one or both of CCC 14A.32.130(3) and (4) [nonconforming use provisions], and CCC 14.32A.140(4) [exemptions].

The Clark County commissioners enacted CCC 14.32A, the "County Manufactured Home Placement Code", in October, 2003. The express purpose was to preserve the life, safety, health and welfare of the general public, which shall not be construed to protect or benefit any specific person or class of persons; To ensure that the appropriate water and sewage disposal systems are available prior to issuance of a manufactured home placement permit, and that they are properly installed prior to human occupancy of a manufactured home; To provide a reasonable degree of protection for manufactured homes and mobile homes placed in the unincorporated areas of Clark County, when damage from winds, earth movements, flooding and other such disasters could cause them to overturn or become a safety hazard; and To make county codes consistent with other national, state, and local regulations. CCC 14.32A.110.

Taken as a whole, CCC 14.32A demonstrates a comprehensive overhaul of mobile home construction and installation standards within Clark County. The code seeks to regulate and impose new standards on all new applications for placement of mobile homes, and also for any existing homes which are moved to new locations. Those which were installed under the prior code were essentially grandfathered as long as their homes remained in the same location. The call of the question is essentially this: what was the status of the second mobile home after the initial permit period expired?

While perhaps less than a model of clarity and internal consistency, the court finds that CCC 14.32A.130 and 14.32A.140 are capable of being read together

logically and consistently to protect and "grandfather" those residents who had legally installed, placed, or existing homes prior to the 2003 amendment. Placement of a second home on a lot within Clark County represents an exception, not the rule. The court interprets the permit as analogous to a license, which may contain restrictions and expire by its own terms. Because the permit for the second mobile home expired in 1994 or 1995, the hearings examiner properly concluded that the second home was not legally in place on the property as of the time when the county adopted the new code, and therefore not exempt from CCC 14.32A.

For the foregoing reasons, the court concludes that this portion of Colf's appeal should be denied because Colf failed to establish that the hearings examiner's decision was an erroneous interpretation of the law or that it is a clearly erroneous application of the law to the facts or that it is not supported by substantial evidence.

2. *Is the second manufactured home a "temporary dwelling" for the purposes of CCC 40.260.210?*

The hearings examiner concluded that Colf's second manufactured home on his property was a "temporary dwelling" for purposes of CCC 40.260.210. Hearings Examiner Final Order, P. 8 §5. Petitioner challenges this interpretation on the basis of improvements and upgrades to the home which bear the flavor of permanence, and the passage of 19 years, and a dictionary definition of "temporary."

The court agrees with the analysis of the hearings examiner. Although not expressly defined under the CCC, there is sufficient contextual information and prior law—namely CCC 18.413—for the court to reasonably conclude that the second manufactured home is a temporary dwelling. The record indicates that the limited duration permit was issued in 1993 on a mobile home hardship specifically under

prior code, CCC 18.413.010 et. seq., which provisions are captioned with "temporary dwellings."

For the foregoing reasons, the court concludes that this portion of Colf's appeal should be denied because Colf failed to establish that the hearings examiner's decision was an erroneous interpretation of the law or that it is a clearly erroneous application of the law to the facts or that it is not supported by substantial evidence.

3. *Is Clark County equitably estopped from taking enforcement action against Colf?*

In order to establish equitable estoppel on the part of Clark County, Colf must establish the following by clear, cogent and convincing evidence: (1) an admission, statement, or act inconsistent with a claim afterward asserted; (2) action by another in reasonable reliance on that act, statement or admission; and, (3) injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement or admission. Robinson v. Seattle, 119 Wn.2d 34, 82, 830 P.2d 318 (1992). Each element must be proved by clear, cogent and convincing evidence. Pioneer Nat'l Title Ins. Co. v. State, 39 Wn.App. 758, 695 P.2d 996 (1985). Equitable estoppel against the government is not favored. Finch v. Matthews, 74 Wn.2d 161, 443 P.2d 833 (1968).

Here, Colf is unable to meet that burden. When Colf purchased his property, he may have relied upon actions or representations of his seller which would give rise to a cause of action arising from that transaction. However, there is no evidence that Colf relied on any *affirmative representation or action* of Clark County. His argument, in essence, is that it is reasonable to rely on governmental *silence* to make legal what was once illegal upon expiration of the hardship permit. This argument would shift

the burden to the government in every real estate transaction between private parties to examine all uses and opine on the legality or illegality of every use thereon. Colf's counsel cites Kramarevcky v. DSHS, 122 Wn.2d 738, 863 P.2d 535 (1993). However, Kramarevcky dealt with a suit against a claimant for benefit overpayments where the claimant detrimentally relied on the overpayments. The court deems this case to be distinguishable.

Petitioner has cited no controlling or persuasive appellate authority for this proposition, and so the court will not sustain the argument.

CONCLUSION

For the foregoing reasons, the court finds that Colf has failed to establish a factual and legal basis for relief under RCW 36.70C.130 (b), (c), or (d). The decision of the hearings examiner is affirmed.

DATED this 20 day of March, 2013

SUPERIOR COURT JUDGE

David E. Gregerson

EXHIBIT D

BEFORE THE HEARINGS EXAMINER
FOR CLARK COUNTY, WASHINGTON

Regarding an appeal by Richard Colf of an alleged violation of the Clark County Code at 9017 NE Spurrel Road in unincorporated Clark County, Washington	))))	**FINAL ORDER** **NOTICE & ORDER CDE2011-B-780**

A. SUBJECT

1. This final order concerns an appeal of Notice and Order CDE2011-B-780 (the "N&O") filed by Richard Colf (the "appellant") regarding property at 9017 NE Spurrel Road; also known as tax lot 15, Section 8, Township 5 North, Range 2 East, Willamette Meridian, Clark County, Washington (the "Property"). County staff issued the N&O on June 4, 2012. It alleges the Property is being used in violation of the Clark County Code ("CCC"). In particular it alleges the appellant violated Clark County Code ("CCC") 40.260.210.C(3) by failing to obtain temporary occupancy approval for a hardship manufactured home.

2. Mr. Shafton appealed the N&O by letter dated June 8, 2012. Mr. Shafton argued that CCC 40.260.210 is inapplicable, because there are no "tempoary" dwellings on the Property. The dwelling at issue was placed by permit in 1993 and is allowed to remain as a nonconforming use pursuant to CCC 14.32A.130(3).

B. APPLICABLE LAW

1. CCC 40.260.210 authorizes the County to issue permits for temporary dwellings in certain circumstances, including a temporary dwelling for a person who is to receive care from or administer care to a resident of the principal dwelling. CCC 40.260.210.C(3) provides, in relevant part:

> A temporary dwelling permit shall be valid for two (2) years, and may be renewed by the issuing body for successive two (2) year periods upon written substantiation by the applicant to the continuing hardship or need justification. Upon the expiration of the two (2) year period, or at the end of each successive two (2) year period(s), if granted, the applicant shall notify the responsible official in writing that the temporary dwelling has been removed and, further, said notice shall include a request for an inspection to determine that the temporary dwelling has, in fact, been removed in compliance with the permit.

2. Former CCC 18.413, which was in effect when the second manufactured home was placed on the Property in 1993, included roughly the same language as in current CC 40.260.210.C(3).

3. CCC 14.32A.130(3) provides:

> This chapter is not retroactive. All manufactured homes installed in Clark County before the effective date of ordinance codified in this chapter which do not comply with the requirements set forth in this chapter are deemed to be nonconforming. Nonconforming manufactured homes will be allowed to remain at their existing locations without complying with the placement standards enumerated herein, subject to the provisions of subsection 4 below.

4. CCC 14.32A.140 provides:

> The following are exempt from the requirements of this chapter:
>
> 1. Manufactured homes placed on sales lots exclusively for the purposes of sale, provided the unit remains unoccupied and the sales activity is consistent with applicable ordinances and codes;
>
> 2. Recreational vehicles, when used as temporary dwellings pursuant to CCC 40.260, provided that any such recreational vehicles are connected to an available and approved sewage disposal and water system;
>
> 3. Recreational vehicles and recreational park trailers, when placed in an approved recreational vehicle park that is in conformance with CCC Title 40, as now enacted or as hereafter amended; and
>
> 4. Manufactured homes legally installed, placed, or existing prior to the effective date of this chapter, as described in Section 14.32A.130(3), above.

5. CCC Title 32 provides for enforcement if a violation of the County Code is alleged. The hearings examiner is authorized to hear and decide appeals of enforcement orders pursuant to CCC Chapter 32.08. If a violation is proven, CCC 32.04.050 provides:

> In addition to or as an alternative to any other judicial or administrative remedy provided herein or by law, any person who violates any land use or public health ordinance, or rules and regulations adopted thereunder, or by each act of commission or omission procures, aids or abets such violation, shall be subject to a civil penalty as provided in Table 32.04.050. Each day may constitute a new violation. All civil penalties assessed will be enforced and collected in accordance with the lien, personal obligation, and other procedures specified in this title or as authorized by law.

Table 32.04.050 provides civil penalties of $250/violation/day for the violation alleged in this case. If the penalty is not paid, CCC 32.08.070(1) provides the County may

prosecute, institute an action to collect the penalty, and/or abate the violation, among other relief. CCC 32.08.070(2) provides:

> Penalties assessed in the notice and order will continue to aggregate during the appeal period unless the appellant prevails on appeal. The aggregated penalty shall not exceed three (3) times the amount of the daily penalty as determined by the Table 32.04.050 for any single violation from its inception through the date the hearings examiner renders its final decision.

Therefore the maximum penalty that can be imposed until after the effective date of this final order is $750.[1]

C. HEARING AND RECORD

1. Hearings Examiner Joe Turner (the "examiner") received testimony at the public hearing about this appeal on July 26, 2012. A record of that testimony is included herein as Exhibit A (Parties), Exhibit B (Recorded Proceedings), and Exhibit C (Written Testimony). The exhibits are filed at the Department of Community Development.

2. County Enforcement Coordinator Kevin Pridemore summarized the history of the case and responded to questions from Mr. Shafton and Mr. Waters.

a. He noted that Rachel Lingafelt,[2] the prior owner of the Property, submitted an application for a temporary hardship manufactured home permit to allow Ms. Lingafelt to provide care for her father. The County approved two-year temporary permit (permit #C93T0166) on May 5, 1993. Ms. Lingafelt placed a second manufactured home on the Property, but she never requested or obtained any required inspections and approvals. The temporary permit lapsed and expired on November 5, 1993, because Ms. Lingafelt failed to have the second manufactured home inspected. The County never verified the placement of the second manufactured home or occupancy by Ms. Lingafelt's father. The County took no enforcement action against Ms. Lingafelt and never required that she obtain the required inspections, renew the temporary permit or remove the second manufactured home. The County could have required that Ms. Lingafelt remove the second manufactured home from the Property after the permit expired, but it did not. Ms. Lingafelt sold the property to the appellant in 2008.

b. The County received a complaint about the Property on October 3, 2011. The County responded to the complaint, and discovered the expired temporary dwelling permit. Clark County Code Enforcement Officer John Scukanec inspected the Property on October 6, 2011 and noted two manufactured homes on the Property, both of which were occupied. Mr. Pridemore mailed two letters to the appellant, on October 10

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[1] ($250/violation x 3 days) = $750

[2] Ms. Lingafelt was known as Rachel Cairns when she purchased the Property in 1987. Ms. Lingafelt later changed her name to Rachel Butler.

and 16, 1011, notifying him that the temporary permit for the second manufactured home had expired. He mailed a third letter to the appellant on January 18, 2012. Mr. Shafton responded to Mr. Pridemore's letters and denied the existence of the violation. Officer Scukanec re-inspected the Property on May 2, 2012 and noted that both manufactured homes remained occupied on the Property. Therefore Mr. Pridemore issued the N&O.

c. He testified that construction of a new deck and/or carport on the Property would require building permits. Repairs to an existing deck and/or carport might require a permit, depending on the type and extent of the repair. Replacement of the steps and railing on the deck would have required a building permit, because these are "structural elements" of the deck. Pouring a concrete pad for an existing carport would not require a building permit. If the appellant had contacted the County about building permits the County would have informed him that the temporary permit for the newer manufactured home had expired.

3. County deputy prosecuting attorney Lawrence Waters requested the examiner hold the record open to allow him an opportunity to review and respond to Mr. Shafton's Hearing Memorandum. He argued that the Code is unambiguous. The second manufactured home on the Property was never legally placed on the Property; temporary permit C93T0166 expired on November 5, 1993 because Ms. Lingafelt never obtained the required inspections and approvals. Therefore the second manufactured home does not qualify as a legal nonconforming use. He opined that the examiner has no equitable authority. Even if the examiner had equitable authority, estoppel cannot apply against the government and the appellant does not have "clean hands."

4. Mr. Shafton introduced a Hearing Memorandum and a notebook of exhibits,[3] and summarized his Hearing Memorandum.

a. He argued that the County erred in interpreting the Code and the monetary penalties sought are arbitrary and capricious. The County should have sought declaratory relief or abatement of the alleged violation, rather than pursuing monetary penalties. The appellant could abate the violation by obtaining a boundary line adjustment to create a separate parcel for each of the manufactured homes on the Property. The appellant owns four abutting parcels, including the Property.

b. He noted that the County did nothing to enforce its Code after it issued Ms. Lingafelt a permit for a temporary manufactured home, even though Ms. Lingafelt never obtained required inspections for the second manufactured home. Three to five years after the temporary manufactured home permit expired, the appellant purchased the Property and two manufactured homes in good faith. The appellant made improvements

[3] The examiner accepted all of the offered exhibits, subject to the opportunity for objections by the County. In his August 21, 2012 Hearing Memorandum, Mr. Waters objected to the admission of "[s]everal exhibits, regarding land in the general area of the property involved in this appeal." [p. 4 of the County's Hearing Memorandum]. The examiner addresses the County's objections below.

to the manufactured homes. The County took no enforcement action until October 2011, roughly 19 years after the permit expired.

c. He argued that there are no "temporary dwellings" on the Property. The Code does not define the term "temporary dwelling." Therefore the examiner must refer to the dictionary definition. The dictionary defines "temporary" as, "lasting for a limited time." The second manufactured home, which has been on the Property for 19 years, since 1993, is not "temporary." The buildings, which are improved with decks and carports, are permanently attached to the Property. The County did not treat the second manufactured home as temporary. It took no action to require removal of the second manufactured home for 19 years.

d. He argued that the second manufactured home is a legal nonconforming use, because it was installed in Clark County before the effective date of CCC 14.32A.130(3). This section provides that, "All manufactured homes installed in Clark County before the effective date of ordinance codified in this chapter which do not comply with the requirements set forth in this chapter are deemed to be nonconforming." The Code does not say, "all lawfully installed manufactured homes." CCC 14.32A.130(3) is more specific than CCC 40. 260.210. Therefore, in the event of a conflict, CCC 14.32A.130(3) applies.

e. He argued that the County is estopped from bringing an enforcement action at this time. The County's silence (lack of enforcement) is a statement by the County. The appellant changed his position in reliance on that statement by buying the Property and improving the manufactured homes. Estoppel is necessary in this case to prevent a manifest injustice. The County did nothing to enforce its Code for 19 years and the appellant relied, to his detriment, on that lack of enforcement. Estoppel in this case will not impair government functions. It could improve government function by encouraging the County to adopt a tickler system to track expiring permits.

f. He requested that, if the examiner affirms the N&O and imposes a monetary penalty, that the order clearly state that additional monetary penalties will not accrue until all appeal opportunities have expired.

5. The appellant testified that he acquired the Property from Ms. Lingafelt (at that time, Ms. Butler) in 1998. There were two manufactured homes on the Property at the time he purchased it and the value of the manufactured homes was included in the purchase price. Ms. Lingafelt's father was not living on the Property at that time. He paid $146,400 for the Property and the manufactured homes. Both manufactured homes remain on the Property, in the same locations, at this time. After he purchased the Property, he added a concrete pad to the existing carport on the older, "mid-70s vintage," manufactured home. He also repaired the deck on the newer, "early-90s vintage," manufactured home in 2004, replacing the decking, handrails and stairs and extending the deck. He replaced the carport roof and the skirting around the newer manufactured home in 2011, before he received the letters from Mr. Pridemore. He did not seek building permits for these improvements.

6. At the end of the hearing the examiner held open the public record until August 27, 2012 to allow the County an opportunity to respond to Mr. Shafton's Hearing Memorandum. The examiner held the record open until September 10, 2012 to allow the appellant an opportunity to respond to the County's submittal and to submit a written final argument. The record closed at 5 PM on September 10, 2012.

D. DISCUSSION

1. In his August 21, 2012 Hearing Memorandum, Mr. Waters objected to the admission of "[s]everal exhibits, regarding land in the general area of the property involved in this appeal." [p. 4 of the County's Hearing Memorandum].[4] The County argued that the exhibits are irrelevant and introduce confusion into the record.

a. CCC 32.08.040(3) provides:

> All appeals shall be conducted in accordance with Washington Administrative Code Chapter 1-08, "Uniform Procedural Rules"; PROVIDED, however, that Sections 1-08-005 through 1-08-007 and Sections 1-08-540 through 1-08-590 shall be excluded. Should any conflict arise between the provisions of this ordinance and the applicable sections of WAC Chapter 1-08, the provisions of this ordinance shall prevail.

b. WAC 1-08-520 provides:

> **Rules of evidence—Admissibility criteria.** Subject to the provisions of these rules, relevant evidence is admissible which, in the opinion of the offer conducing the hearing, is the best evidence reasonably obtainable, having due regard for its necessity, availability and trustworthiness. In passing upon the admissibility of evidence, the officer conducting the hearing shall give consideration to, but shall not be bound to follow, the rules of evidence governing civil proceedings, in matters not involving trial by jury, in the superior court of the state of Washington.

c. The examiner finds that Exhibits 5, 8, 9, 10, and 12 of the appellant's Hearing Memorandum are relevant to an issue before the examiner; the feasibility of abating the violation through a boundary line adjustment. As discussed below, the examiner finds that the second manufactured home is a violation of CCC 40.260.210.C(3). Therefore the appellant must abate the violation by removing the second

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[4] The County did not identify specific exhibits it proposed to exclude from the record. The examiner understands, from the context of the County's motion, that the County is referring to Exhibits 5, 8, 9, 10, and 12 of the appellant's Hearing Memorandum, all of which involve parcels the appellant owns that are adjacent to the Property.

manufactured home from the Property. Based on the evidence offered in the disputed Exhibits, the appellant may be able to record a boundary line adjustment that would locate the second manufactured home on a separate parcel owned by the appellant without physically moving the second manufactured home.[5] Therefore the examiner will admit all of the offered exhibits.

2. The appellant argued that the County should have sought declaratory relief or abatement of the alleged violation, rather than issuing a N&O and pursuing monetary penalties. CCC 32.04 authorizes the director[6] to correct violations of the County's land use and public health ordinances by initiating a misdemeanor criminal proceeding (CCC 32.04.045), issuing a Stop Work Order (32.08.010), Citation (CCC 32.04.055) or Notice and Order(32.08.020), or by abating the violation (CCC 32.04.060). The director has sole discretion to determine which enforcement mechanism, or combination thereof, to utilize in a particular case. CCC 32.08.010(1) provides:

> Whenever a director has reason to believe that a use or condition exists in violation of any land use or public health ordinance, or rules and regulations adopted thereunder, he/she is authorized to initiate enforcement action pursuant to Section 32.04.050 and/or, at his option, he/she may commence an administrative notice and order proceeding under this chapter to cause the enforcement and correction of each violation.

The examiner has no authority to second guess this exercise of discretion by the Director. If the Director chooses to issue a N&O in a particular case and that N&O is appealed, the examiner's role is to determine whether, based on a preponderance of the evidence in the record, the violations alleged in the N&O exist, whether the cited parties are liable for those violations, and what remedies are consistent with the law and the facts.

3. The examiner finds that the County has the burden of proof to show that a violation of CCC 40.260.210.C(3) exists as alleged in the N&O. This is an enforcement proceeding, not a LUPA appeal of a "land use decision" in Superior Court or an appeal of a SEPA determination. Therefore the standards listed in RCW 36.70C.130(1) are

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[5] The examiner offers no opinion on the potential success of a boundary line adjustment request. The examiner merely finds that the evidence is sufficient to show that it is feasible to apply for a boundary line adjustment that would locate the second manufactured home on a separate vacant parcel owned by the appellant. Therefore, it is reasonable to impose a condition requiring the appellant to abate the violation by applying for a boundary line adjustment or by removing the second manufactured home from the Property.

[6] CCC 32.04.010(2) provides:

> "Director" as used in this title shall mean the director of public works, director of community development, or director of environmental services, or such other person as the county commissioners shall by ordinance authorize to utilize the provisions of this title and shall also include any duly authorized representative of such director. "Director" shall also mean the "local health officer" as that term is used in Chapter 70.05 RCW.

inapplicable. To extent the appellant is asserting, as an affirmative defense, that the second manufactured home is allowed on the Property as a nonconforming use, the appellant has the burden of proof. CCC 40.530.010.C(2).

4. Based on the testimony by County staff, photographs of the Property and other evidence in the record, the examiner finds that the County sustained its burden of proof that the violation exists as alleged. The second manufactured home was placed on the Property as a temporary dwelling pursuant to former CCC 18.413. The temporary permit, by its stated terms[7] and the plain language of former CCC 18.413.030.C, was only valid for two years unless renewed. The temporary permit was not renewed. The permit expressly states that it expired on May 5, 1994. The manufactured home was never removed from the Property as required by former CCC 18.413.030.C and current CCC 40.260.210.C(3). Therefore it is a violation of CCC 40.260.210.C(3).

5. The appellant argued that the second manufactured home on the Property is not a "temporary dwelling," because it is permanently attached to the Property and has existed on the Property for more than 19 years. Although the Code does not include an express definition of the term "temporary dwelling," the meaning of the term is clear from the context of CCC 40.260.210.A and Former 18.413.010. Reference to the dictionary definition is unnecessary.

a. A temporary dwelling is a dwelling placed on a parcel with an existing principle dwelling where the second dwelling is to be occupied by:

i. A person providing care to, or receiving care from, a resident of the primary dwelling. Former CCC 18.413.0101.A and current CCC 40.260.210.A(1); or

ii. A caretaker, hired-hand or other similar full-time employee working on the lot, tract or parcel in connection with an agricultural or related use of the premises Former CCC 18.413.0101.B and current CCC 40.260.210.A(2); or

iii. A relative of a resident of the principal dwelling who is over sixty-two (62) years of age with an adjusted gross income at or below fifty percent (50%) of the median family income for Clark County. Former CCC 18.413.0101.C and current CCC 40.260.210.A(3).[8]

b. In this case, the second manufactured home was expressly approved as a temporary dwelling for care. The fact that it has remained on the Property for a significant period of time is irrelevant. Some "temporary" dwellings" may exist for many years, in the case of a caretaker dwelling, potentially even for generations, provided the temporary permit is renewed every two years. In this case, the temporary permit for the

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[7] Permit C93T0166 includes the following language: "Description: 26' X 44' MOH 2 YR TEMP FOR FATHER," and "To Expire: 05/05/94.

[8] Current CCC 40.260.210.A(3) imposes additional restrictions for properties in agricultural and forest zones that are inapplicable in this case.

second manufactured home never became final and was never renewed. Therefore the temporary permit expired and the second manufactured home became an illegal use when it was not removed from the Property after the temporary permit expired.

6. The appellant argues that the second manufactured home is a nonconforming use, based on the plain language of CCC 14.32A.130(3). The examiner disagrees.

a. "The usual rules of statutory construction apply to municipal ordinances." *Connor v. City of Seattle*, 153 Wn.App. 673, 223 P.3d 1201, 1206 (2009). The examiner's objective is to determine the council's intent. *Id.* If a statute's meaning is plain on its face, the examiner must give effect to that plain meaning as the expression of legislative intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). However, "In ascertaining the plain meaning of a statute, we look not only to the ordinary meaning of the language at issue, but also to the general context of the statute, related provisions, and the statutory scheme as a whole." *Id.* Ordinances must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. *Connor*.

b. The appellant is correct that the plain language of CCC 14.32A.130(3) appears to state that all existing manufactured homes in the County that did not conform to the requirements of the new ordinance are nonconforming, regardless of whether they were legally established prior to the effective date of the ordinance. However, CCC 14.32A.140(4) expressly modifies the exemption provided by CCC 14.32A.130(3), limiting the nonconforming exemption to manufactured homes that were legally existing upon the effective date of the ordinance. CCC 14.32A.140(4) is clearly part of the "context" of CCC 14.32A.130(3). CCC 14.32A.140(4) expressly refers to and modifies CCC 14.32A.130(3). The Board could have phrased the ordinance better, including the term "legally" in CCC 14.32A.130(3). However the Board's failure to do is not fatal in this case. The Board clearly expressed its intent by including CCC 14.32A.140(4). As discussed above, the second manufactured home on the Property was not legally existing on the effective date of CCC 14.32A. Therefore the exemption provided by CCC 14.32A.130(3) and 14.32A.140(4) is inapplicable.

c. The appellant's interpretation, that CCC 14.32A.130(3) made all existing manufactured homes in the County that did not conform to the requirements of the new ordinance are nonconforming, regardless of whether they were legally established prior to the effective date of the ordinance, would render CCC 14.32A.140(4) meaningless. If all existing manufactured homes in the County that did not conform to the requirements of were made nonconforming pursuant to CCC 14.32A.130(3), the exemption for legally established manufactured homes CCC 14.32A.140(4) would be redundant and unnecessary. The examiner must interpret the Code to give effect to all the language used, with no portion rendered meaningless or superfluous. *Connor*.

7. The fact that the violation has existed for roughly 19 years is irrelevant. the County has no authority to waive compliance with the clear requirements of the Code. Code violations are of a continuing nature; every day is a new violation. CCC 32.04.050.

8. The examiner lacks the authority to decide the appellant's claim of equitable estoppel. The examiner is not a judge and does not preside over a court of law. Therefore the examiner cannot base his decision on principles of equity. The examiner's authority is limited to that granted by law, "[w]ithout inherent or common-law powers and the examiner may exercise only those powers conferred either expressly or by necessary implication." *Chaussee v. Snohomish County Council*, 38 Wn.App. 630, 636, 689 P.2d 1084 (1984).

a. In this case, the examiner's powers are established by state law and County ordinances. RCW 36.70.970(1) authorizes the County to adopt a hearing examiner system and authorize the hearing examiner to hear and decide certain types of applications. CCC 2.51.020 authorizes the examiner to "[i]nterpret, review, and implement land use regulations and policies as provided in this chapter or by other ordinances" The examiner only has the authority to "[a]ffirm or modify the order previously issued if he finds that a violation has occurred. CCC 32.08.040(5). Nothing in state law or the Clark County Code authorizes the examiner to decide equitable issues.

b. The appellant raised equity issues in his written materials. That is sufficient to preserve the issue for appeal, to the extent that is necessary.

9. A violation of the Clark County Code is a public nuisance, based on CCC Title 32. The violation should be abated in a timely manner to maintain the substantial public interest in effective land use planning and to protect the health, safety and welfare of the people of Clark County.

10. The examiner finds that the appellant can remedy the violation by:

a. Removing the second manufactured home from the Property; or

b. Applying for a boundary line adjustment to locate the second manufactured home on a separate parcel and, if the boundary line adjustment is approved, obtaining all required inspections and approvals for the second manufactured home.

11. The appellant should have a reasonable time in which to remedy the violation before additional penalties accrue. In this case, the examiner finds that sixty (60) calendar days from the date of the final order is a reasonable time within which to remedy the violations.

12. If the appellant does not comply with the terms of this final order, then, except for reasons wholly beyond the appellant's control, the appellant should pay Clark County a daily penalty of $250 per violation per day, beginning on the day the appellant violates the terms of this final order and continuing until the appellant remedies the violation.

13. The Enforcement Coordinator should be authorized to extend the above deadlines if the appellant make a continuing timely, diligent, good faith effort to comply with this schedule, but is unable to do so due to circumstances wholly beyond his control.

The appellant's personal financial circumstances is not a delay wholly beyond the appellant's control.

14. CCC 32.08.070(2) provides that although enforcement of the N&O shall be stayed during the pendency of any appeal, the penalties assessed in the N&O continue to aggregate during the appeal period unless the appellant prevails on appeal. The aggregated penalty shall not exceed three (3) times the amount of the daily penalty as determined by the Table 32.04.050 for any single violation from its inception through the date the hearings examiner renders its final decision. In this case the appellant did not prevail and the violation continues to exist on the Property after the hearing in this appeal. Therefore the examiner must impose a cumulative penalty of $750.

a. The appellant urged the examiner to prohibit the imposition of additional monetary penalties pending further appeals of this decision. The examiner has authority to impose such a limitation. The Code expressly provides, "The aggregated penalty shall not exceed three (3) times the amount of the daily penalty as determined by the Table 32.04.050 for any single violation from its inception through the date the hearings examiner renders its final decision." The examiner has no authority to change the plain language of the Code to limit monetary penalties during further appeals after the examiner renders his final decision. However, the examiner believes it is the County's practice not to impose monetary penalties while any appeal is pending.

E. DECISION

1. In recognition of the findings and conclusions contained herein, and incorporating the reports of affected agencies and testimony received in this matter, the examiner hereby:

a. Denies the appeal and affirms N&O CDE2011-B-780 against the appellant Richard Colf; and

b. Orders the appellant, within sixty (60) calendar days from the date of this Final Order, to comply with the following:

i. Pay Clark County $750 as the accrued penalty before the date of this final order; and

ii. Remove the second manufactured home from the Property; or

iv. Apply for a boundary line adjustment to locate the second manufactured home on a separate parcel and, if the boundary line adjustment is approved, obtain all required inspections and approvals for the second manufactured home.

(A) If the boundary line adjustment or required inspections and approvals for the second manufactured home are denied, the appellant shall remove the second manufactured home from the Property within 60 days from the effective date of the denial, including any appeals.

2. If the appellant complies with paragraph E.1.b of this final order, the N&O shall be dismissed without further action by the examiner; and

3. If the appellant do not comply with paragraph E.1.b, then, beginning sixty-one (61) calendar days from the effective date of this final order, the appellant shall pay to Clark County a monetary penalty of two hundred fifty dollars ($250) per violation per day for each day thereafter until the Director finds the Property complies with the Code; provided,

a. Monetary penalties provided for in this paragraph 3 shall not accrue to the extent the County Enforcement Coordinator finds that the appellant's failure to timely comply is due to reasons wholly beyond the appellant's control, and that the appellant has made a continuing, timely, diligent good faith effort to comply with this final order. The appellant's financial circumstances are not a reason wholly beyond the appellant's control.

DATED this 21st day of September 2012.

Joe Turner, AICP
Clark County Hearings Examiner

CERTIFICATE OF SERVICE

I, Thelma Kremer, hereby certify and state the following:

I am a citizen of the United States of America and a resident of the State of Washington; I am over the age of eighteen years; I am not a party to this action; and I am competent to be a witness herein.

On this 13th day of August, 2013, I electronically filed the foregoing Clark County Brief with the Court of Appeals of the State of Washington, Division II, and such e-filing will cause a true and correct copy of the foregoing to be emailed to the party as follows:

Attorney for Appellant Colf:

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Thelma Kremer

CLARK COUNTY PROSECUTOR

August 12, 2013 - 2:30 PM

Transmittal Letter

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Case Name: Richard Colf v. Clark County, WA

Court of Appeals Case Number: 44818-1

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A copy of this document has been emailed to the following addresses:

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